BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALBERTA L. WILLIAMS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,045,620
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund appealed the July 21, 2011, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Workers Compensation Board heard oral argument on October 11, 2011. The Director appointed Joseph Seiwert of Wichita, Kansas, to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie Sample. As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary R. Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Seiwert will continue to serve as a Board Member Pro Tem in this case.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, the parties stipulated to the amount of claimant's average weekly wage determined by the ALJ.

ISSUES

In her Application for Hearing filed with the Division of Workers Compensation on May 12, 2009, claimant listed the date of accident for this claim as being a "[s]eries from

4/10/07 w/ specific incident 1/31/09 and continuing through last date worked."[1] At oral argument before the Board, claimant alleged her claim was based upon a repetitive series of accidents culminating on her last day worked. Respondent denies claimant suffered a work-related injury, but if there was a work-related injury, respondent alleges it occurred in April 2007.

In the July 21, 2011, Award, ALJ Sanders determined: (1) claimant's accidental injury arose out of and in the course of her employment with respondent; (2) claimant's date of accident is May 12, 2009, or the date that respondent was given written notice of the injury; (3) claimant provided respondent with timely notice; (4) claimant provided timely written claim; (5) claimant's average weekly at the time of the accident was $529.60 and it increased to $674.63 after August 15, 2009, when fringe benefits were terminated; (6) medical reports and notes from Dr. Edward N. Letourneau and the physical therapist were excluded from the record as medical hearsay; (7) claimant sustained a 34% whole body functional impairment; (8) claimant was entitled to receive temporary total disability benefits from July 20, 2009, through September 13, 2009; and (9) claimant was entitled to receive permanent partial disability benefits ultimately based upon a 93.5% work disability.

Respondent asserts:

> The evidence in this matter is that the claimant may have had a temporary exacerbation of her knee in April 2007, but for which she gave no notice and provided no timely written claim. Claimant suggests that notice or a writing from the Division of Workers Compensation is an adequate substitute for notice or writing from the claimant; the law does not so provide. The alleged accident of January 31, 2009 is a complete fabrication, and as to the series, her employment did not produce any physical change in her knee such that she suffered injury as that is defined by K.S.A. 44-508(e); her impairment must be proven by "competent medical evidence" 44-510e(a). Her total knee replacement was attributable not to her employment, or any aggravation or acceleration, but to the natural progression of a preexisting osteoarthritic condition. The conclusion of the claimant's hired expert that the claimant suffers from bursitis and/or a back injury for which no treatment has ever been rendered, or has been asked for, is unsupported by the evidence.[2]

Respondent also maintains the ALJ erred in excluding from the record the medical records of Dr. Letourneau and the physical therapist. Finally, respondent appealed the issue of average weekly wage.

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[1] Application for Hearing (filed May 12, 2009).

[2] Respondent's Brief at 8 (filed Aug. 23, 2011).

Claimant requests the Board affirm the ALJ's Award, except for corrections to claimant's average weekly wage to conform with the wage statements stipulated into the record by the parties. Further, claimant submits that as Dr. Letourneau and the physical therapist did not testify their reports are not admissible medical evidence and are not a part of the record for this case. At oral argument before the Board the parties stipulated that the Board would not remand this claim to the ALJ if it determined the records of Dr. Letourneau and the physical therapist are admissible.

At oral argument before the Board, the parties stipulated the ALJ correctly determined the amount of claimant's average weekly wage with and without fringe benefits. The parties could not agree on the date claimant no longer received fringe benefits.

At oral argument before the Board, respondent stipulated the only medical expert opinion of claimant's percentage of permanent functional impairment and task loss was provided by Dr. Pedro A. Murati. The doctor opined claimant has a permanent functional impairment of 34% to the body as a whole and a task loss of 87%. The 87% task loss averaged with claimant's 100% wage loss yields a 93.5% work disability. The parties agreed that if the Board finds claimant gave timely notice of the accident, made a timely written claim and claimant met with personal injury by accident arising out of and in the course of her employment, that Dr. Murati's opinions on functional impairment and task loss should be adopted by the Board.

The issues before the Board on this appeal are:

1. Did the ALJ err by not including as part of the record Dr. Letourneau's records and the physical therapy records?

2. Did claimant meet with personal injury by accident arising out of and in the course of her employment with respondent?

3. If so, did claimant give timely notice of her accident and make a timely written claim? Before these issues can be resolved, claimant's date of accident must be determined.

4. What is the nature and extent of claimant's disability?

5. What is claimant's average weekly wage (AWW)? The parties have agreed on the amount of claimant's AWW, but could not agree on the date claimant's fringe benefits ended.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant began working for respondent at the Kansas Neurological Institute (KNI) as a developmental disability technician in July 2004. Her job duties required a great deal of physical exertion. Claimant was required to take total care of severely disabled patients. This included transferring patients from beds to wheelchairs, bathing patients, and a variety of other job tasks that involved heavy lifting, bending and strenuous physical activity.

On April 10, 2007, claimant was emptying trash at work and her left knee buckled. Claimant immediately experienced pain and notified her supervisor. Claimant sought treatment from her primary care physician. He referred claimant to Dr. John H. Gilbert, an orthopedic specialist. Claimant testified she was taken off work by Dr. Gilbert for a couple of days. Claimant testified that she then went back to her regular job duties.

Dr. Gilbert first saw claimant on April 27, 2007. His report indicates claimant injured her left knee on April 17, 2007, while throwing trash in a dumpster. Claimant told Dr. Gilbert that she previously had swelling in the left knee. His impression was that claimant had patellofemoral arthritis in the left knee. Dr. Gilbert testified that claimant had patellofemoral joint space narrowing and osteophytes (bone spurs). He injected the left knee with a mixture of Xylocaine and Kenalog. On May 18, 2007, claimant returned to see Dr. Gilbert. His report indicated claimant had satisfactory progress with patellofemoral arthritis.

On January 29, 2009, claimant again sought treatment for her left knee from Dr. Gilbert. His impression was osteoarthritis in her left knee. Claimant told Dr. Gilbert that she had good relief of pain in the knee until the previous Thanksgiving. He again injected the left knee with a mixture of Xylocaine and Kenalog. X-rays revealed claimant had changes in the lateral joint compartment particularly on the left and both medial joint compartments. The changes were joint space narrowing and osteophyte formation.

Claimant testified that on January 31, 2009, she was pushing a client in a wheelchair when the left knee began hurting. She stated that she went home and called Carol Stinson *[sic]*[3], the weekend supervisor. Claimant was to work the next day. She informed Ms. Steanson of the injured knee. Claimant testified she was told by Ms. Steanson to go to the doctor. Claimant went to Med-Assist, who took her off work for three days. She then went to her primary care physician, Dr. George Evans, who took her off work for a week.

Carol Steanson was claimant's supervisor on January 31, 2009. She could not remember having a conversation with claimant about an injury involving pushing a client in a wheelchair. If claimant had reported an injury, Ms. Steanson indicated she would have

[3] Carol Steanson was one of claimant's supervisors. The court reporter at the regular hearing apparently misspelled Steanson as Stinson and the parties failed to ask the reporter to correct this error.

sent her to the medical unit for treatment. The medical unit is open 24 hours a day.[4] Then a report would be completed.

Diane Waggoner, who handles KNI's workers compensation claims, also testified. She indicated that on or around April 10, 2007, an employee report of accident was completed. The part of the accident report completed by claimant indicates she injured herself while taking out the trash, but does not indicate what part of the body was injured. No medical treatment was provided to claimant by respondent, other than claimant receiving ibuprofen.[5]

Ms. Waggoner testified that on April 21, 2009, she was approached by claimant with a paper concerning a scheduled total knee replacement in July 2009. Claimant reported to Ms. Waggoner that the knee replacement was work related. Ms. Waggoner and claimant completed a second employee report of accident. Claimant indicated the date of the accident was April 2007.

On February 19, 2009, claimant saw Dr. Gilbert. His examination revealed claimant had an antalgic stance and gait. There is no mention of a January 31, 2009, injury in Dr. Gilbert's report. Dr. Gilbert testified that claimant did not tell him of the wheelchair incident.[6] Dr. Gilbert's report indicated that left knee replacement arthroplasty will be necessary to provide relief of claimant's symptoms. Dr. Gilbert continued claimant on medication and referred her for a surgical consultation. He restricted her to light duty and gave her a light duty slip. Later he revised this to allow claimant to return to regular work with claimant wanting a 10-15 minute break every two hours to rest and elevate her knee. After this visit, Dr. Gilbert never saw claimant again.[7] Dr. Gilbert's reports regarding her left knee do not indicate that claimant complained of back pain. Claimant indicated she told Dr. Gilbert that she had back pain.

Claimant testified she gave the light duty slip to Jamie Barajas, her immediate supervisor. Claimant then returned to work under the revised restrictions from Dr. Gilbert. From time to time she would inform her supervisors that the left knee was bothering her. Mr. Barajas testified he was not informed by claimant about suffering an injury while pushing a client in a wheelchair. However, he acknowledged claimant told him the things she was doing at work were making her knee hurt.

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[4] Steanson Depo. at 14.

[5] Waggoner Depo. at 7.

[6] Gilbert Depo. at 22.

[7] *Id.*, at 23.

Claimant's knee continued to worsen. She would sit, and her supervisors would get upset. Claimant was referred by Dr. Gilbert to Dr. Brett E. Wallace, who saw claimant on March 10, 2009. His impression was osteoarthritis of the left knee, unresponsive to conservative treatment. Dr. Wallace scheduled claimant for a left total knee replacement.

On May 12, 2009, claimant filed an Application for Hearing, alleging a series of injuries from April 10, 2007, with a specific incident on January 31, 2009, and continuing through the last date she worked for respondent.

Claimant continued working until July 16, 2009. On July 20, 2009, Dr. Wallace performed a left total knee replacement on claimant. Claimant's health insurance paid for the surgery. Claimant testified Dr. Wallace took her off work from July 20, 2009, until September 13, 2009.[8] After recovering from the surgery, claimant attempted to return to work at KNI. Claimant testified that as a result of the restrictions given by Dr. Wallace, KNI had no available jobs that she could perform within the restrictions.[9]

Claimant worked part time at Stormont Vail Hospital from December 18, 2009, through January 31, 2011, when she quit because of knee pain. While working at Stormont Vail, claimant earned $10.00 per hour and worked at least 12 hours per week.

At his deposition, Dr. Gilbert was questioned about Dr. Edward N. Letourneau's records, which Dr. Gilbert received from respondent's insurance fund for his review. Dr. Letourneau did not testify. Claimant was referred to Dr. Letourneau by claimant's family physician. Dr. Letourneau saw claimant on April 1, 8 and 15, 2009. With respect to claimant's knees, Dr. Letourneau made a diagnosis of bilateral osteoarthritis, bilateral effusion and bilateral crepitus. At each of claimant's appointments, Dr. Letourneau injected the left knee with Euflexxa.

Dr. Letourneau's report of April 15, 2009, indicates claimant wondered about workers compensation and that claimant had some injury in 2007. His records indicate claimant had a history of knee pain and swelling as far back as 1982. In 2004 Dr. Letourneau diagnosed claimant with osteoarthritis of the knees and injected both knees. His report on April 1, 2009, indicates claimant's pain had been worse over the past year. Dr. Gilbert testified concerning the treatment Dr. Letourneau provided to claimant. Dr. Gilbert testified his opinion that claimant's symptoms and the left total knee replacement are attributable to her preexisting degenerative joint disease and osteoarthritis are supported by the records of Dr. Letourneau.

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[8] R.H. Trans. at 20.

[9] *Id.*, at 20, 31.

Three exhibits were offered by respondent's counsel at Dr. Gilbert's deposition. Claimant's counsel did not object to Exhibit 2.[10] Exhibit 2 is Dr. Gilbert's medical records and also contains the physical therapy notes of Dr. Gilbert's physical therapist and physical therapist assistant, who did not testify. Claimant's attorney did object to Exhibit 3, which contained a patient medical questionnaire and the medical records of Dr. Letourneau. Claimant's counsel objected to Exhibit 3 on the grounds it contained medical hearsay, unless Dr. Letourneau testified.

At his deposition, Dr. Gilbert testified as to causation of claimant's left knee problems:

> Q. (Mr. Benedict) Okay. And did you provide an opinion in that letter as to whether or not Miss Williams' left knee problems were related to her employment?
>
> A. (Dr. Gilbert) Yes, sir.
>
> Q. And what was your opinion?
>
> A. My opinion was that her current complaints are the result of her underlying degenerative joint disease and not as a result of the injury of April 20 *[sic]*, 2007.
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> Q. Would the same be true for the necessity of surgery?
>
> A. For the most part, yes, sir.
>
> Q. And you say for the most part. What parts might be associated with her employment?
>
> A. Well, I'm not sure that there is any of it that's specifically associated with her employment. It's, primarily, a result of cumulative effects of hard work and birthdays. To the extent that those are associated with her employment, they could be ascribed to the employment, but I believe the underlying etiology for her osteoarthritis is probably more genetic than other factors.[11]

When asked about the effect the incident of January 31, 2009, might have on claimant's knee, the following discourse took place:

> Q. (Mr. Cooper) The things that were causing her pain was the walking, and she's testified that her job required her to be on her feet for long periods of time; that she had to walk considerable distances, push wheelchairs sometimes with very heavy

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[10] Gilbert Depo. at 19.

[11] *Id.*, at 14-15.

clients in them and lift residents there at KNI. Would those be the kind of activities that would cause pain in an individual with arthritis in their knees?

A. (Dr. Gilbert) Those would be not surprising, yes, sir.

Q. All right. Did Miss Williams tell you that she had an episode on January 31st of 2009 where she was pushing a wheelchair up a -- a wheelchair containing a large client, I believe she said, up a ramp and had additional knee symptomatology?

A. I don't believe I listed that specific history, no, sir.

Q. All right. Would that be the kind of an activity that could cause an aggravation of a knee problem making it hurt more?

A. That certainly puts a load on the knee, yes, sir.[12]

Dr. Gilbert was not asked to render an opinion on whether claimant has a permanent impairment of function. He did indicate that after the April 2007 incident claimant went back to full duties at her job. Dr. Gilbert was not requested to render an opinion as to whether claimant suffered a back injury, and if so, whether it was work related.

At the request of claimant's counsel, claimant was seen by Dr. Pedro A. Murati, a certified independent medical examiner, on August 25, 2009. He obtained from claimant a medical history and reviewed past medical reports of Drs. Gilbert and Wallace. He also physically examined claimant. Claimant's complaints were pain in the left knee and left foot, she could not go up and down steps, and pain in the lower back due to limping. She indicated to Dr. Murati that her back pain was constant.

Dr. Murati's impression was status post noncemented left total knee replacement, low back pain secondary to antalgic gait and bilateral SI joint dysfunction. He opined that claimant's knee and back conditions were causally related to the series of injuries she had while working for KNI.[13]

Dr. Murati examined claimant a second time on February 9, 2010. His "[b]ack examination [of claimant] revealed L5 spinous process to be most tender with very tight tone of the left lumbosacral paraspinals. Pelvic compression was positive, bilaterally. SLRs were grossly measured to me *[sic]* negative, bilaterally. There was positive SI joint examination, bilaterally. There was a negative axial load, distraction, axial rotation and flip

[12] *Id.*, at 22.

[13] Murati Depo. at 8.

examination. Hip examination revealed a negative Patrick's exam, bilaterally."[14] Claimant had severe antalgia and there was a significant difference in leg length. Claimant was using a single-point cane when she saw Dr. Murati. When cross-examined by respondent's counsel, Dr. Murati testified claimant had very bad spasms in her low back, loss of left hamstring reflex, a weak toe extensor and involvement of the sacroiliac joints. It was the opinion of Dr. Murati that the loss of claimant's left hamstring reflex was caused by radiculopathy. He acknowledged that his opinion was based on claimant's subjective complaints.

Dr. Murati gave claimant a 5% permanent functional impairment to the body as a whole for the low back pain. Dr. Murati opined claimant falls within DRE Lumbosacral Category II. He also testified claimant has a 7% permanent impairment of the left lower extremity for trochanteric bursitis and a 75% permanent impairment of the left lower extremity for the knee replacement. The left lower extremity impairments combined for a 77% left lower extremity impairment which in turn converts to a 31% whole body impairment. The whole body impairments combine for a 34% impairment to the body as a whole. Dr. Murati testified his opinions were rendered in accordance with the AMA *Guides*.[15]

Dr. Murati assigned claimant significant restrictions. Dr. Robert W. Barnett, a vocational rehabilitation counselor, interviewed claimant and determined that she performed 23 non-duplicative job tasks in the 15 years prior to her injury. Dr. Murati opined claimant can no longer perform 20 of the 23 job tasks for a task loss of 87%.

The ALJ found that in April 2007, claimant initially aggravated an arthritic condition in her left knee. Claimant went back to work. Her work activities, including the incident on January 31, 2009, of pushing a client in a wheelchair, further aggravated her left knee condition. On April 21, 2009, claimant told her employer she was going to have a total knee replacement and the cause was her job duties. On May 12, 2009, claimant filed an Application for Hearing. The ALJ concluded that the date of accident was May 12, 2009, and that claimant provided timely notice and made timely written claim.

The ALJ concluded that claimant suffered a left knee injury by accident arising out of and in the course of her employment. The left knee injury caused claimant to have a severe antalgic gait which resulted in a back injury. The ALJ found claimant's AWW as of the date of accident was $529.60 (without fringe benefits). The ALJ determined that respondent terminated claimant's health insurance and other benefits on August 15, 2009, which increased claimant's AWW to $674.63 thereafter.

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[14] *Id.*, Ex. 3.

[15] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (*4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The ALJ adopted the opinions of Dr. Murati and concluded that claimant had a 34% permanent functional impairment to the body as a whole. She also found claimant currently had a 93.5% work disability based upon an 87% task loss and a 100% wage loss. The ALJ further found claimant is entitled to 3.86 weeks of temporary total disability (TTD) benefits at the rate of $353.08 per week followed by 4.14 weeks of TTD benefits at the rate of $449.78 per week. The ALJ also ruled the reports and notes from Dr. Letourneau and the physical therapist would not be made part of the record.

PRINCIPLES OF LAW

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[16] A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."[17] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[18] The existence, nature and extent of the disability of an injured workman is a question of fact.[19] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[20] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[21]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[22] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[23]

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[16] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[17] K.S.A. 2008 Supp. 44-501(a).

[18] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[19] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[20] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[21] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[22] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[23] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[24] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[25]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[26]

K.S.A. 2008 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this

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[24] K.S.A. 2008 Supp. 44-501(a).

[25] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

[26] *Id.*, at 278.

> subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 44-519 provides:

> Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

In *Staggs*,[27] the Board addressed the issue of whether certain medical records were inadmissable pursuant to K.S.A. 44-519. The majority of the Board held:

> First, K.S.A. 44-519 does not operate to exclude all medical records. Rather it excludes only opinions that are not supported by the physician's testimony. Second, even those opinions which are otherwise inadmissible may be considered by other medical experts in formulating their opinions. [Footnote citing *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).] Many of these records had been provided to the physicians that testified, including Dr. Murati and Dr. Brown. Furthermore, the Appeals Board finds these hospital treatment records do not contain the type of examination reports contemplated by K.S.A. 44-519. The records do not contain opinions that were generated for purposes of litigation, such as under K.S.A. 44-515, and do not contain rating reports that go to the question of impairment as opposed to treatment. For these reasons the records covered by the stipulations have been considered by the Appeals Board.[28]

ANALYSIS

Respondent asserts the ALJ erred by excluding from the record the medical records of Dr. Letourneau and the physical therapist. Claimant contends K.S.A. 44-519 provides the basis for excluding Dr. Letourneau's records. The notes of the physical therapist and physical therapist assistant were included in Exhibit 2 of Dr. Gilbert's deposition. Claimant's counsel did not object to Exhibit 2, and, therefore, the Board finds the physical therapy notes are part of the record.

The Board finds that Dr. Letourneau's records should not have been excluded from the record. K.S.A. 44-519 does not bar the records of Dr. Letourneau. Here, the records

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[27] *Staggs v. Hunter Care Centers, Inc.*, No. 210,500, 1999 WL 195252 (Kan. WCAB Mar. 17, 1999).

[28] *Id.*

of Dr. Letourneau were offered to establish facts that Dr. Gilbert relied upon to render his opinion. The records of Dr. Letourneau were not generated for the purpose of litigation. Rather, Dr. Letourneau's records detailed his diagnosis and treatment of claimant. In *Staggs*, the majority of the Board held that K.S.A. 44-519 does not exclude such records where the medical provider does not testify. In *Helm*,[29] the Board stated: "Prior treatment records which were considered by a testifying physician in arriving at his or her opinion are admissible, but not to prove the validity or accuracy of the matters asserted therein. Instead, they are admissible to test the soundness of the opinion by the physician who assessed and utilized the record in arriving at his or her own opinions. [Citation omitted.]" The Board finds Dr. Letourneau's records are part of the record.

Respondent contends claimant did not suffer a work-related injury. Respondent asserts claimant's symptoms and the left total knee replacement are attributable to her preexisting degenerative joint disease and osteoarthritis and cites Dr. Gilbert's opinion concerning causation. Claimant contends that her left knee condition and resulting back problems were the cumulative result of her repetitive work duties.

Dr. Gilbert's opinion was that claimant's current complaints are the result of her underlying degenerative joint disease and not as a result of the April 2007 injury. However, he testified that the need for her left knee surgery is ". . . primarily, a result of cumulative effects of hard work and birthdays. To the extent that those are associated with her employment, they could be ascribed to the employment . . . ."[30] Dr. Gilbert testified it would not be surprising if claimant's work activities would cause increased pain and an incident like the one on January 31, 2009, could cause an increase in symptomatology.

Dr. Murati opined that claimant's knee and back conditions were causally related to the series of injuries she had while working for KNI. He opined that claimant's low back condition and her trochanteric bursitis were caused by her antalgic gait. Dr. Murati noted claimant's left leg was shorter than her right leg.

Dr. Letourneau's records do not indicate whether claimant's left knee condition was caused, aggravated or accelerated by her repetitive work activities. His records indicated claimant had knee pain and swelling as early as 1982. However, his April 1, 2009, report stated claimant's knee pain worsened in the past year. That corroborates claimant's testimony that her work activities caused her injury.

The Board concludes the opinions of Drs. Gilbert and Murati support the ALJ's finding that claimant's left knee injury and back injury arose out of and in the course of her employment with respondent. The Board agrees with that finding.

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[29] *Helm v. Conklin Cars,* No. 237,920, 2000 WL 759369 (Kan. WCAB May 31, 2000).

[30] Gilbert Depo. at 15.

Next, a determination of claimant's date of accident must be made. Respondent alleges claimant suffered a single traumatic accident in April 2007. The facts, however, support claimant's contention that she suffered a series of repetitive injuries. After the April 10, 2007, incident claimant continued performing her regular job duties, and with a 10-15 minute break every two hours to rest and elevate her knee beginning in February 2009, until her employment ended on July 16, 2009. The opinions of Drs. Gilbert and Murati also support a finding that claimant suffered a series of repetitive injuries.

Claimant was never seen by an authorized physician. Nor is there any evidence that any physician communicated to claimant in writing that her condition was work related. Thus, K.S.A. 2008 Supp. 44-508(d) provides the date of accident is the date upon which claimant gave written notice of the injury to respondent. Claimant filed an Application for Hearing on May 12, 2009. Accordingly, the Board affirms the ALJ's finding that the date of accident is May 12, 2009.

Respondent was served with a copy of the Application for Hearing on or about May 12, 2009. Therefore, the Board finds that claimant gave timely notice of her accident and made a timely written claim.

The opinions of Dr. Murati as to claimant's permanent functional impairment and task loss are uncontroverted. Based upon the stipulation of the parties at oral argument before the Board, the Board affirms the ALJ's findings that claimant has a 34% permanent functional impairment to the body as a whole and an 87% task loss.

Claimant is not working and, therefore, she has a 100% wage loss. Averaging claimant's 100% wage loss with her 87% task loss yields a 93.5% work disability. For the period claimant was working at Stormont Vail Hospital (December 18, 2009, through January 31, 2011), claimant has an 82% wage loss (claimant was earning approximately $120.00 per week while working at Stormont Vail). Averaging claimant's 82% wage loss with her 87% task loss yields an 84.5% work disability for the period from December 18, 2009, through January 31, 2011.

The ALJ determined that claimant's AWW, without fringe benefits, was $529.60. Claimant's fringe benefits consisting of $104.78 per week for health insurance and $40.25 per week for a pension ended on August 15, 2009. Thereafter, claimant's AWW increased to $674.63. The parties were able to agree that claimant's AWW without fringe benefits was $529.60 and with fringe benefits was $674.63. However, the parties could not agree on the date claimant's fringe benefits were discontinued. The Board concludes that the greater weight of the evidence supports the ALJ's findings concerning AWW.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[31] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

CONCLUSION

1. Dr. Letourneau's records and the physical therapy records are made part of the record and have been considered by the Board in rendering this Order.

2. Claimant's left knee and low back injuries arose out of and in the course of her employment with respondent.

3. Claimant suffered a series of repetitive injuries and her date of accident is May 12, 2009.

4. Claimant gave timely notice of the accident and made a timely written claim.

5. Claimant has a 34% permanent functional impairment to the body as a whole.

6. Claimant has an 87% task loss and a 100% wage loss, which results in a work disability of 93.5%. For the period from December 18, 2009, through January 31, 2011, claimant has an 84.5% work disability based upon an 87% task loss and an 82% wage loss.

7. Claimant's fringe benefits were discontinued by respondent on August 15, 2009. Therefore, claimant's AWW on the date of accident was $529.60 and her AWW commencing August 16, 2009, was $674.63.

AWARD

WHEREFORE, the Board modifies the July 21, 2011, Award entered by ALJ Sanders as follows:

Alberta L. Williams is granted compensation from the State of Kansas and its insurance fund for a May 12, 2009, accident and resulting disability.

Based upon an average weekly wage of $529.60, Ms. Williams is entitled to receive the following disability benefits:

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[31] K.S.A. 2010 Supp. 44-555c(k).

For the period ending July 16, 2009, Ms. Williams is entitled to receive 9.29 weeks of permanent partial general disability benefits at $353.08 per week, or $3,280.11, for a 34% permanent partial general disability.

For the period from July 17, 2009, through July 19, 2009, Ms. Williams is entitled to receive .43 weeks of permanent partial general disability benefits at $353.08 per week, or $151.82, for a 93.5% permanent partial general disability.

For the period from July 20, 2009, through August 15, 2009, Ms. Williams is entitled to receive 3.86 weeks of temporary total disability benefits at $353.08 per week, or $1,362.89.

Based upon an average weekly wage of $674.63, Ms. Williams is entitled to receive the following disability benefits:

For the period from August 16, 2009, through September 13, 2009, Ms. Williams is entitled to receive 4.14 weeks of temporary total disability benefits at $449.78 per week, or $1,862.09.

For the period from September 14, 2009, through December 17, 2009, Ms. Williams is entitled to receive 13.57 weeks of permanent partial general disability benefits at $449.78 per week, or $6,103.51, for a 93.5% permanent partial general disability.

For the period from December 18, 2009, through January 31, 2011, Ms. Williams is entitled to receive 58.57 weeks of permanent partial general disability benefits at $449.78 per week, or $26,343.61, for an 84.5% permanent partial general disability.

For the period commencing February 1, 2011, Ms. Williams is entitled to receive 135.39 weeks of permanent partial general disability benefits at $449.78 per week, or $60,895.97, for a 93.5% permanent partial general disability. The total award is not to exceed $100,000.

As of November 21, 2011, Ms. Williams is entitled to receive 3.86 weeks of temporary total disability compensation at $353.08 per week in the sum of $1,362.89, plus 4.14 weeks of temporary total disability compensation at $449.78 per week in the sum of $1,862.09, plus 9.72 weeks of permanent partial general disability compensation at $353.08 per week in the sum of $3,431.94, plus 114.14 weeks of permanent partial general disability compensation at $449.78 per week in the sum of $51,337.89, for a total due and owing of $57,994.81, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $42,005.19 shall be paid at $449.78 per week until paid or until further order of the Director.

Dr. Edward N. Letourneau's records and the physical therapy records are made part of the record.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Rebecca A. Sanders, Administrative Law Judge